STATE OF MICHIGAN

COURT OF APPEALS

DARNELL DUNLAP,

Plaintiff-Appellee,

DEPARTMENT OF SOCIAL SERVICES,

Intervening Plaintiff,

v

CITY OF DETROIT,

Defendant/Third-Party Plaintiff,

DETROIT EDISON COMPANY,

Defendant/Third-Party
Defendant/Appellant,

and

VALTZ EXCAVATION COMPANY,

Defendant.

UNPUBLISHED
April 17, 2001

No. 210413
Wayne Circuit Court
LC No. 95-502402-NO

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

PER CURIAM.

In this negligence action, defendant Detroit Edison appeals as of right from an order of the Wayne Circuit Court dismissing without prejudice the third-party complaint filed by the City of Detroit against Detroit Edison. We affirm.

The instant case arose out of plaintiff's fall into an uncovered manhole in the City of Detroit while crossing a street covered with steam emanating from the manhole. The accident occurred on Henry Street, near its intersection with Cass. Plaintiff suffered third-degree burns over seventy percent of his body as a result of the fall. After a trial, the jury found in favor of

plaintiff against Detroit Edison. The jury found that neither the City of Detroit nor plaintiff were negligent.

Defendant Detroit Edison (hereinafter "defendant") first argues that the steam emanating from the manhole was open and obvious and, therefore, defendant did not owe a duty to protect plaintiff from, or warn him of, the dangerous condition. However, defendant failed to preserve this issue for review by raising the open and obvious issue during the trial court proceedings. *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The general rule prohibiting appellate review of unpreserved issues is "based upon the nature of the adversary process and the need for judicial efficiency." *Napier*, *supra* at 228. We will not allow defendant to argue a new theory on appeal that it could have raised below and thereby give it a second chance to argue its case. Therefore, we decline to review this issue.

Defendant next argues that the trial court erred in denying its motion for a new trial brought on the ground that the jury's finding that plaintiff was not comparatively negligent was contrary to the great weight of the evidence. We disagree. We review for an abuse of discretion a trial court's decision on a motion for a new trial. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993).

An adult plaintiff has a duty to exercise reasonable care for his own safety and protection. *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 484; 491 NW2d 585 (1992). To establish that plaintiff was negligent, defendant must show that plaintiff breached that duty and that the breach was the proximate cause of his damages. *Riddle v McLouth Steel Products, Inc*, 440 Mich 85, 96; 485 NW2d 676 (1992). Here, defendant presented evidence that the steam could be seen from two blocks away, that the steam was dense enough to obscure plaintiff's vision, that a hissing sound coming from the manhole could be heard, and that intense heat could be felt by a person approaching the manhole. On the other hand, plaintiff testified that he did not hear, feel, or smell anything out of the ordinary as he approached the manhole, and that he looked for headlights before crossing the street. He testified he had walked halfway down Henry Street by the time he reached the manhole, and that he had to cross the street through the steam because the steam covered a large area and he would have had to walk back to Woodward to avoid the steam.

Generally, the reasonableness of a party's conduct is a question for the jury to decide. *Riddle*, *supra* at 96. After having reviewed the record, we conclude that the jury's finding that plaintiff was not negligent was not contrary to the "overwhelming weight of the evidence." *Bordeaux*, *supra* at 170. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Finally, defendant argues that the trial court erred when it refused to qualify defendant's expert, Dr. Carl Uzgiris, as an expert with respect to whether the Boosey valve was functioning properly and with respect to the source of the water in the manhole. We disagree. A trial court's decision regarding the qualification of an expert witness will be reversed only for an abuse of discretion. *Mulholland v DEC International Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). Similarly, a trial court's decision to admit expert testimony, or to exclude it as speculative, is

reviewed for an abuse of discretion. *Phillips v Diehm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999).

A person may be qualified to testify as an expert witness by virtue of his knowledge, skill, experience, training, or education in the subject matter of the testimony. MRE 702; *Grow v W A Thomas Co*, 236 Mich App 696, 713; 601 NW2d 426 (1999). The party offering the expert has the burden of showing that the expert has the necessary qualifications. *Siirila v Barrios*, 398 Mich 576, 591; 248 NW2d 171 (1976).

Dr. Uzgiris testified that he had a bachelor of science degree and a master of science degree in mechanical engineering, and that he had a doctorate degree in both mechanical and aerospace engineering. With respect to his qualification to testify as an expert regarding the Boosey valve, Dr. Uzgiris testified that a Boosey valve is merely a check valve, which is "elementary" for a mechanical engineer. He testified that he examined an exemplar of a Boosey valve before trial. However, Dr. Uzgiris further testified that he had never been involved in the design or maintenance of "a Boosey valve *or any similar valve*."[1] He also testified that he had never been involved in the design, operation, or maintenance of an underground steam system like the one operated by defendant. On the basis of Dr. Uzgiris' testimony that he had no professional experience involving the design or maintenance of a Boosey valve or any similar valve, we cannot conclude that the trial court's decision not to qualify him as an expert with respect to the Boosey valve was an abuse of discretion.

In addition to qualification of an expert witness, there must be facts in evidence to support the expert's testimony. MRE 703; *Mulholland, supra* at 411. Where expert testimony is purely speculative, it should be excluded pursuant to MRE 403.[2] *Phillips, supra* at 402. Here, the trial court disallowed Dr. Uzgiris' testimony that a water main break was the source of the water in the manhole on the ground that the testimony was mere supposition and would confuse the jury. Dr. Uzgiris testified that he arrived at his conclusion that a water main break was the source of the water in the manhole by the process of eliminating all other possible sources. However, he also testified that he had no knowledge of any specific water main break and, therefore, he could not pinpoint the precise source of the water. Further, there were inconsistencies between Dr. Uzgiris' testimony at trial regarding the alleged water main break and his testimony on this matter at a deposition taken before trial. With no evidence from which a jury could conclude that a water main break was the source of the water in the manhole, Dr. Uzgiris' opinion that a water main break must have been the source of the water in the manhole would have been of little use to the jury and, as the trial court concluded, would likely confuse

[1] In contrast, plaintiff's expert, Dr. Arthur Billy, testified that he had "plenty of experience" with check valves.

[2] MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

the jury. The trial court did not abuse its discretion in concluding that the probative value of the testimony was substantially outweighed by the danger of confusing the jury. MRE 403.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy